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IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1953. No. 715.

PALMER SHIPPING CORPORATION,
Petitioner,

vs.

WILLIAM C. LUTH,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable EARL WARREN, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Respondent, WILLIAM C. LUTH, respectfully shows to your Honorable Court as follows:

I. COUNTER STATEMENT OF THE CASE.

A counter statement of the case is required. Petitioner's statement omits crucial facts upon which the two lower Courts reached their decisions. Petitioner's Statement ignores "the impact of its own conduct toward libellant * * *" which is the pivot around which the issue here has heretofore been, and must continue to be, resolved. (See Opinion, R-116.)

A complete and candid statement of the facts will demonstrate that this case presents only questions of fact which have been determined by both Courts below and which do not merit consideration by this Court.

1. Preliminary.

Respondent, a merchant seaman, claimed, and was awarded unearned wages, and maintenance and cure because of disability sustained in the service of his vessel. The Decree of the District Court was entered June 15, 1953. On July 2, 1953, petitioner paid respondent the unearned wages awarded him. On September 12, 1953, petitioner paid respondent that part of the maintenance and cure award which covered the period from October 17 to December 21, 1951.

These payments, made after trial and Decree, do not affect the Findings and Conclusions of the Trial Court; they did not affect the argument in, or the decision of, the Court of Appeals. For the purposes of the petition now before this Court, it is as if these payments had not been made.

The petition concerns only respondent's right to maintenance and cure and the Findings of Fact and Conclusions of Law of the District Court, and the affirmance by the Court of Appeals that "the record establishes that the District Court's fact findings were supported by the testimony and,

further, that it did not err as a matter of law in its award of maintenance to the libellant" (Opinion, R-115).

2. The facts.

Respondent's condition was diagnosed as an active duodenal ulcer (R-62, Libellant's Ex. 1, R-100). Two operations were performed at the hospital in Buenos Aires (R-63). These left a large abdominal scar (R-11). On October 11, 1951, respondent was released from the hospital with directions to follow a prescribed diet limiting the quality and quantity of food (R-63).

On October 17, 1951, Luth arrived in New York (R-63). He went on to Philadelphia, his home, where he was confined to bed for ten to twelve days (R-63). He then reported to the outpatient department of the United States Public Health Service Station in Philadelphia. There again he received a diet prescribing meals seven times a day (R-67).

Luth remained under outpatient care until December 21, 1951. He had not worked since leaving the vessel August 2, 1951. Following his repatriation and up to December 21, 1951, Luth made at least four demands for the payment of maintenance. It is undisputed that petitioner refused to pay maintenance notwithstanding that:

(1) Immediately after repatriation (October 18, 1951), respondent requested maintenance from petitioner's local agent (R-64);

(2) Following this, respondent's union officials made request for his maintenance from petitioner's New York office (R-64);

(3) Thereafter, respondent wrote several letters to petitioner requesting payment of maintenance (R-64);

(4) Respondent's counsel made demand for mainte-

nance upon petitioner by letter dated November 16, 1951 (Libellant's Exhibit 2, R-66, 101);

It was petitioner's demonstrated callous and contemptuous disregard of respondent's right to maintenance which prompted the Court of Appeals to say:

> "Respondent had inexcusably failed to discharge its obligation to pay the libellant maintenance from October 17, 1951 to December 21, 1951, despite his repeated demands" (Opinion, R-115).

Because of petitioner's refusal to pay him maintenance and unearned wages, Luth was compelled to return to work:

> "* * * December 21, right around that time I was just flat broke that I had to go to work" (R-9).

Despite his distressed physical condition, respondent was obliged to ask for and receive a "fit-for-duty" slip from the United States Public Health Service (R-10). The Court of Appeals found:

> "libellant was *prematurely compelled* to return to work on December 21, 1951, while he was still ill" (emphasis supplied, Opinion, R-116).

On the day Luth received the fit-for-duty slip he obtained employment on the S. S. "Dorothy", as carpenter, where he served from December 21, 1951 until April 1, 1952. Although this was easier work than boatswain, it was quite laborious (R-10, 11).

About two weeks after joining the S. S. "Dorothy", Luth noted a swelling at the site of the abdominal scars. He thought it was a "natural reaction to the surgery". In April, 1952, he was told that the swelling was an incisional hernia. It caused his rejection from employment by the Sun Shipyard (R-11, 12, 13). This finding was confirmed by the United States Public Health Service, where

Luth was told he needed an operation, and that he would have to "lay up from three to four months". Luth did not submit to surgery because he was without money to sustain himself during the period of convalescence (R-14; Libellant's Ex. 4, R-68, 102), which finding is confirmed by the Court of Appeals (R-116).

On June 20, 1952, Luth's counsel wrote to Petitioner and its counsel advising of Luth's desire to submit to surgery; and of his need for maintenance during convalescence, without which he would be unable to sustain himself during that period. Respondent requested assurance that maintenance would be paid during convalescence after surgery (Libellant's Ex. 4, R-68, 102). Petitioner did not reply to the letter.

Luth made one more sea trip. He was unable to continue thereafter. The work was "too rugged", and he could not "stand the food" (R-13). From then on he worked as carpenter, on the waterfront. That work was also laborious, and he was forty pounds underweight. Although work was available for him, he could not work every day (R-13, 31, 32, 68-70). Meanwhile, his counsel continued to demand maintenance, and petitioner continued to refuse to pay (Libellant's Exs. 5, 6, 7, R-70, 71, 103-105).

Luth earned about $1,000.00 on each of the two subsequent voyages which lasted about three months each. In both Courts below petitioner argued that from the earnings of either of these voyages respondent had sufficient money to maintain himself during convalescence. Petitioner ignored the testimony that respondent during each voyage supported his family of three and only the balance was available for future use. In other words, petitioner argues that $1,000.00 was sufficient to support Luth's family of three for six to seven months—about $30.00 per week.[1] As to this, the Court of Appeals said:

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[1] Compare this with petitioner's acknowledgment that maintenance for the seaman **alone** is $56.00 per week (3rd Conclusion of Law, R-54).

"The District Court did not subscribe to this contention, nor do we" (R-116).

Petitioner admits that up to trial Luth was suffering from (1) gastritis, resulting from the operations (R-97), and (2) an incisional hernia, also causally related to the operations (R-81, 94, 95).

It is not denied that when subjected to stress the hernia becomes prominently noticeable (R-81) and produces pain (R-28). Dr. Harold R. Wood, petitioner's physician, examined Luth April 4, 1952 and on June 24, 1952, he reported to defense counsel and "suggested that the hernia could be easily repaired and that it should be done" (R-96). It was also his opinion that Luth's digestive condition could be benefited by medical care (R-97).

Petitioner concedes that the disability was not sustained by any vice or misconduct attributable to respondent (21st Finding of Fact, R-53).

The Trial Court's finding is undisputed that following his repatriation, respondent was disabled for a period of 225 days, as the result of these conditions sustained in the service of the ship. The District Court awarded maintenance for these 225 days and found as a fact that during this period improvement in Luth's condition from nursing care and medical attention could reasonably have been anticipated (22nd Finding of Fact, R-53).

The Court of Appeals affirmed that judgment in an opinion by Judge Kalodner, which is reported in 210 F. 2d 224 (R-110-117).

II. ARGUMENT.

Two courts have already passed upon the facts of this case. The District Court and the Court of Appeals are in agreement that because of petitioner's persistent and inex-

cusable refusal to pay him maintenance, respondent's failure to avail himself of surgical treatment until petitioner agreed to pay maintenance during convalescence was "reasonable" (24th Finding of Fact, R-53, Opinion, R-115). Petitioner is now asking this Court to reverse this Finding of Fact.

1. There is no conflict.

This case is not in conflict with any case in any other circuit. It is not in conflict with any decision of this Court. No case in any jurisdiction condones the "economic pressure" (Opinion, R-116) to which petitioner subjected respondent. There is no case in any jurisdiction which permits a wrongdoer to profit from his own wrong.

2. Where the shipowner has persistently refused to pay maintenance, an indigent seaman is not obliged to submit to surgery without assurance that maintenance will be paid during convalescence.

Petitioner now urges this Court to reject the uncontradicted evidence upon which the District Court and the Court of Appeals determined that Luth's conduct was "reasonable" and that it "did not amount to refusal of treatment" (Opinion, R-115). There was no basis or warrant to reject that evidence in either of the Courts below, and none exists here.

Petitioner does not meet the issue; it confuses the issue. The clarity and definition of the issue depends upon the facts upon which the claimed "refusal" of April 4, 1952 is predicated. Significantly, all of these facts are omitted by petitioner. Petitioner's studied and deliberate refusals to pay maintenance prior to December 21, 1951, make it very clear that respondent's conduct was in no sense "voluntary".

Rather, it was an "inability to accept" medical care which was imposed upon the seaman by this shipowner, who now seeks immunity from liability for its own wrong.

Indeed, this distinction is the basis for the decisions. In all of the cases barring recovery of maintenance, the refusal was without good cause. The following are typical illustrations:

In *United States v. Johnson*, 160 F. 2d 789 (C. A. 9, 1947), the seaman refused hospitalization because "I couldn't see going back to another hospital. It was just one doctor's opinion against a whole dozen or more that I had seen already" (p. 798).

In *The Suguache*, 112 F. 2d 482 (C. A. 2, 1940), the seaman was found guilty of "leaving the Galveston Hospital without permission and after being discharged from the Fort Stanton Hospital for disciplinary reasons" (p. 483).

In *United States v. Loyola*, 161 F. 2d 126 (C. A. 9, 1947), "No excuse was given for not reporting to the Marine Hospital" (p. 128).

On the other hand, in *Murphy v. American Barge Line Co.*, 169 F. 2d 61 (C. A. 3, 1948), cert. den. 335 U. S. 859 (1948), the Court held it was the shipowner's duty to furnish a seaman transportation to a distant hospital and since it did not do so, the seaman's failure to avail himself of hospitalization did not amount to a refusal of treatment, precluding his recovery for maintenance and cure. See also *Spellman v. American Barge Line Co.*, 176 F. 2d 716 (C. A. 3, 1949).

Petitioner is wrong, therefore, when it says that respondent's failure to avail himself of surgery, *ipso facto*, barred him from recovering maintenance. The Court of Appeals is right; "Other factors must be taken into account and given effect" (see Opinion, R-115).

Some of the "other factors" present in this case are:

> (1) Petitioner's inexcusable refusal to discharge its obligation to pay maintenance from October 17 to December 21, 1951, despite respondent's repeated demands;

(2) Petitioner's inexcusable refusal to pay respondent his unearned wages despite respondent's repeated demands;

(3) Respondent's compulsion to return to work prematurely on December 21, 1951, while he was still ill, solely resulting from petitioner's conduct;

(4) Respondent's lack of financial resources other than his earnings;

(5) Finally, respondent's inability to work for several months during convalescence from the required surgery.

The only question in this case is whether respondent acted "reasonably" in view of his proven inability to maintain himself during convalescence, and of petitioner's refusal to pay maintenance. We urge that the mere offer of surgery, without more, did not discharge the obligation since petitioner refused to provide the means by which Luth was to survive thereafter. Its conduct *before* the offer of surgery makes it clear that petitioner had no intention of honoring its obligation *after* surgery. Respondent could only judge petitioner's future conduct by its past, and that judgment was held "reasonable" by both Courts:

> "The libellant had suffered as a result of this economic pressure and he was justified in being concerned as to how he would maintain himself during the post-surgery convalescence and in refusing to submit to surgery without assurance from respondent that it would pay him maintenance" (Opinion, R-116).

Respondent's conduct was reasonable. There was ample warrant for the 24th Finding of Fact (R-53).

3. The duty to provide maintenance and cure lasts so long as the seaman's need continues; so long as he can benefit from medical care and attention.

No claim is here made for maintenance for the balance of respondent's life. We are not here concerned with how long after trial respondent is entitled to maintenance. The only issue here is whether the 22nd Finding of Fact is right: that improvement in respondent's condition from nursing care and medical attention could reasonably have been anticipated (R-53).

A. The gastritis.

In June, 1952 (six months after the "fit-for-duty" slip) petitioner's physician, Dr. John Willard, examined Luth and found that he "was having digestive symptoms as a result of the conditions for which he had been operated and the condition resulting from the operation" (R-97). Dr. Willard stated that Luth was suffering from an aftermath of the operation, "a residual gastritis", and it was his opinion that Luth could benefit from medical care (R-97, 98).

Dr. Salzmann said that dietary care would relieve this condition (R-29). The medical witnesses are in agreement that this condition could have been improved by proper medical treatment and adherence to a diet. Respondent is entitled to maintenance.

Farrell v. United States, 336 U. S. 511 (1949).

B. The hernia.

Assuming, *arguendo*, that the gastritis is not in this case, petitioner is still liable for maintenance and cure to date

of trial. The testimony is undisputed that there was a direct relationship between the hernia and respondent's two operations in Buenos Aires. No one disputes that surgery would have benefited the incisional hernia condition. In view of this evidence, it is absurd for petitioner to contend that Luth is not entitled to maintenance and cure up to time of trial.

Lipscomb v. Groves, 187 F. 2d 40 (C. A. 3, 1951); *Brett v. Carras,* 203 F. 2d 451 (C. A. 3, 1953).

There appears to be no meritorious reason for disturbing the 22nd Finding of Fact that Luth's conditions could have improved by medical care and attention (R-53).

III. CONCLUSION.

The decision below involves no conflict. It has been decided against the petitioner by two lower Courts and involves no new or important legal principle. Rather, it applies well-established rules of law and logic to uncontroverted facts. It does not merit review by this Court.

Respectfully submitted,

PAUL M. GOLDSTEIN,
Proctor for William C. Luth, Respondent.

Of Counsel:
SAMUEL J. STARK
HERMAN MOSKOWITZ
STARK AND GOLDSTEIN